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No. 10-244

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY,
TRAVELERS CASUALTY AND SURETY COMPANY
and TRAVELERS PROPERTY CASUALTY CORP.,

Petitioners,

—v.—

CHUBB INDEMNITY INSURANCE COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

If the enforceability of a long-final plan of reorganization can be collaterally attacked in the manner upheld by the court below, there will be profound consequences for bankruptcy courts and litigants. The Court of Appeals' refusal to abide by this Court's holding and mandate in *Bailey* that "it was error for the Court of Appeals to reevaluate the Bankruptcy Court's exercise of jurisdiction in 1986," combined with the lower court's refusal to follow decades of Supreme Court precedent regarding the propriety of publication notice for conjectural, future and unknown claimants, such as Chubb, promises to usher in a new era of collateral litigation by persons affected by long-final confirmation orders. Such a result would fly in the face of this Court's admonition that "[i]t is just as important that there should be a place to end as that there should be a place to begin litigation, and the need for finality forbids a court called upon to enforce a final order to tunnel back . . . for the purpose of reassessing prior jurisdiction de novo." *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195, 2206 (2009) (App. 74a) (internal citations and quotation marks omitted). As Chubb concedes, on remand the Court of Appeals "revisited [and] . . . reaffirm[ed] its prior jurisdictional determination" that this Court overruled in *Bailey*. Opp'n at 23–24. Contrary to Chubb's assertions, this Court most assuredly did not remand this case for the purpose of "inviting" the lower court to ignore this Court's holding and to reinstate the jurisdictional holding that this Court found to be in error. To the contrary, as this Court pointedly observed, "[a]lmost a quarter-century

after the 1986 Orders were entered, the time to prune them is over." *Bailey*, 129 S. Ct. at 2206 (App. 74a).

This case involves one of the largest and most important bankruptcies in American history. The insurance settlement and channeling injunction contained in the confirmation order—the enforceability of which is directly at issue here—was the cornerstone of the Manville reorganization, and served as the model for Section 524(g) of the Bankruptcy Code. This historic confirmation order became final in 1986, nearly a quarter-century ago. On direct appeal, the Court of Appeals held in 1988 that "all . . . interested parties were provided with notice and a hearing before the settlements were approved by the Bankruptcy Court." *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir. 1988) (App. 292a). The elaborate notice procedures employed by the Bankruptcy Court—including publishing the material terms of the order at issue here in the twenty largest nationwide newspapers in the United States and Canada, and over seventy of the largest newspapers in each of the fifty states—fully and unequivocally "met the requirements of due process." *Id.* (App. 292a); *see* (App. 569a–575a).

The Court of Appeals' ruling upholding a collateral attack of a final judgment confirming a plan of reorganization that was preceded by extensive publication notice of the precise terms of the relief to be sought in what was one of the most high-profile bankruptcies of its time, and which notice was found on direct appeal to fully comport with the requirements of due process, is unprecedented. Pursuant to this Court's seminal ruling in

Mullane, for decades litigants and courts have relied upon publication notice as a means of ensuring that due process protections are appropriately taken into account where the ability to provide individualized notice is impractical or impossible. *See United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378 (2010). Successful bankruptcy reorganizations simply cannot occur if bankruptcy courts cannot afford complete finality to debtors and protected third parties. Indeed, publication notice is routinely part of every major bankruptcy case, including, notably, the recent General Motors, Lehman Brothers, and Washington Mutual bankruptcies, as well as scores of asbestos bankruptcies that have been modeled on the orders in this case.[1]

The ability of bankruptcy courts to successfully reorganize viable commercial enterprises is in grave danger if courts are permitted to engage in the type of collateral challenge, second-guessing and misapplication of class action notice principles reflected in the Court of Appeals' ruling on remand, which invalidated a long-final injunction in one of the highest-profile bankruptcies in his-

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[1] *See* Orders Establishing Deadline for Filing Proof of Claims and Approving the Form and Manner of Notice Thereof entered in *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. Sept. 16, 2009), ECF No. 4079; *In re Lehman Brothers Holdings Inc.*, No. 08-13555 (Bankr. S.D.N.Y. July 2, 2009), ECF No. 4271; *In re Washington Mutual, Inc.*, No. 08-12229 (Bankr. D. Del. Jan. 30, 2009), ECF No. 632; *see also In re W.R. Grace & Co.*, 398 B.R. 368, 373–74 (D. Del. 2008); *In re WorldCom, Inc.*, 325 B.R. 511, 514–15 (Bankr. S.D.N.Y. 2005); *In re Celotex Corp.*, 245 B.R. 174, 176 (Bankr. M.D. Fla. 2000); *In re Texaco Inc.*, 182 B.R. 937, 955 (Bankr. S.D.N.Y. 1995); *In re Trans World Airlines, Inc.*, 185 B.R. 302, 308 (Bankr. E.D. Mo. 1995).

tory. Moreover, the ruling threatens to open a floodgate of new litigation challenging the enforceability of confirmation orders, once considered final. The ruling below will have additional unintended consequences, such as undermining the incentive of parties to contribute funds to bankruptcy trusts, as the proposed *Amicus Curiae* notes in its submission in support of Petitioners.[2]

The damage to the finality of plans of reorganization is all the greater given the manner in which the Court of Appeals flagrantly disregarded the central holding of *Bailey* "that it was error for the Court of Appeals to reevaluate the Bankruptcy Court's exercise of jurisdiction in 1986." *Bailey*, 129 S. Ct. at 2205 (App. 70a). Moreover, separate and apart from the important bankruptcy principles at stake here, this case raises important issues concerning the extent to which lower courts are free to disregard the mandate of this Court.[3]

A. The Court of Appeals' Decision Is Contrary to Sixty Years of Case Law Upholding the Constitutionality of Reasonable Publication Notice to Bind Future and Contingent Claimants

For sixty years, it has been settled law that reasonable publication notice may bind future and contingent claimants. *Mullane v. Cent. Hanover*

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[2] *See* Brief of Brady C. Williamson, as *Amicus Curiae*, in Support of Petitioners, *Travelers v. Chubb*, No. 10-244 (U.S. Sept. 20, 2010).

[3] As discussed further in Petitioner's reply in support of its concurrent petition for writ of mandamus, on remand the lower court violated the mandate of this Court in *Bailey*, and reinstated the jurisdictional holding which this Court had overruled.

Bank & Trust Co., 339 U.S. 306, 317–18 (1950); *In re Trans World Airlines, Inc.*, 96 F.3d 687, 689 (3d Cir. 1996); *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775, 789 (7th Cir. 1992); *In re GAC Corp.*, 681 F.2d 1295, 1300 (11th Cir. 1982). On remand, the Court of Appeals, in reasoning that it acknowledged was "undoubtedly *sui generis*," improperly interjected class action jurisprudence into the issue of what constitutes adequate notice in bankruptcy proceedings.[4] *In re Johns-Manville Corp.*, 600 F.3d 135, 154–55 (2d Cir. 2010) (App. 43a). The standard articulated by the Court of Appeals makes adequate notice to future and contingent claimants virtually impossible, subjecting debtors and interested parties to endless litigation and collateral challenges, and thereby undermining final judgments confirming plans of reorganization. *See Bailey*, 129 S. Ct. at 2206 (App. 73a); *see also Bosiger v. U.S. Airways*, 510 F.3d 442, 450 (4th Cir. 2007) ("[T]he very functioning of the bankruptcy system is dependent on its finality.").

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[4] The Bankruptcy Rules promulgated by this Court recognize that the Federal Rules of Civil Procedure made applicable to adversary proceedings do not apply to Chapter 11 reorganization plans. Chubb incorrectly cites Bankruptcy Rule 7001 to imply that the Federal Rule of Civil Procedure 23 would apply to the 1986 Orders (Opp'n at 36), but Bankruptcy Rule 7001 specifically exempts Chapter 11 reorganization plans from its application. *See* 28 U.S.C. § 2075; Fed. R. Bankr. P. 7001(7),(8), 7002 *et seq.* In fact, as noted by the proposed *Amicus Curiae* (a respected bankruptcy professor, lawyer, commentator and former Chair of the National Bankruptcy Review Commission), the National Bankruptcy Review Commission specifically rejected proposed application of Rule 23 principles for managing claims in Chapter 11. *See* Williamson *Amicus Curiae* Br. at 6–7.

Chubb argues that it was an unrepresented future claimant in 1984–1986 and that it could not have received constitutionally sufficient notice as a future claimant. But, for decades, publication notice has been held to be constitutionally adequate to bind "unknown" persons whose interests are "conjectural or future" or otherwise unknown in the "due course of business." *Mullane*, 339 U.S at 317–18; *see Espinosa*, 130 S. Ct. at 1378. The precedent established by the Court of Appeals is totally unworkable in the bankruptcy context and would "completely vitiate the important goal of prompt and effectual administration and settlement of debtors' estates." *Chemetron Corp. v. Jones*, 72 F.3d 341, 348 (3d Cir. 1995). Chubb's contention that it was "entitled to adequate representation" and appointment of a future claims representative to protect its interests, Opp'n at 27–29, entirely misses the mark. Where, as here, publication notice is appropriate for claims that are unknown or conjectural, it is the publication notice that provides due process protections. *Mullane*, 339 U.S. at 317–18. Courts are not, in addition, required to appoint future claims representatives for every class of claimant to which publication was directed.[5] Chubb, a sophis-

[5] Chubb attempts to distinguish *Mullane*, but the first sentence of this Court's opinion confirms the case is directly on point: "This controversy questions the constitutional sufficiency of notice to beneficiaries . . . ." 339 U.S. at 307. This Court's ruling regarding notice to "beneficiaries whose interests are either conjectural or future or . . . do not in due course of business come to knowledge of the common trustee," *id.* at 317, is the bedrock constitutional principle of notice used during the last sixty years in reorganizations under the bankruptcy laws, particularly where the debtor has far-reaching national and international relationships.

ticated insurer that doubtless knew of the Manville bankruptcy as the District Court here expressly found, was apprised of the hearing and the specific relief that was proposed to be entered, and afforded an opportunity to represent its own interests. *In re Johns-Manville Corp.*, 340 B.R. 49, 68 (S.D.N.Y. 2006) (App. 163a–164a). Under *Mullane* and dozens of other cases, that is all the notice to which Chubb was entitled. *See, e.g.*, *Espinosa*, 130 S. Ct. at 1378; *In re Trans World Airlines, Inc.*, 96 F.3d at 689; *Chemetron*, 72 F.3d at 345–46; *In re GAC Corp.*, 681 F.2d at 1300; *In re Union Hosp. Ass'n of Bronx*, 226 B.R. 134, 138–140 (Bankr. S.D.N.Y. 1998).

Chubb also argues that it was not an interested party in the Manville proceeding and that the Direct Action claims were "unimaginable" in 1986. While Chubb's claims were indeed contingent in 1986, it does not follow that Chubb was entitled to anything more than publication notice under *Mullane*. *See Mullane*, 339 U.S. at 317–18; *see also Chemetron*, 72 F.3d at 348. The Manville publication notice contained word-for-word the plain terms that were found in the 1986 Orders, that any claims that might be asserted against Travelers "based upon, arising out of or relating to" the Manville policies would be barred, and provided all recipients of such notice with a right to be heard.[6] (App. 564a). Such notice was all that was

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See Chemetron, 72 F.3d at 348. Chubb's claim is a paradigm of the types of claims addressed by this Court in *Mullane*.

[6] As the District Court correctly ruled, "[t]he broad language regarding the proposed Insurance Settlement Order in the nationwide August 2, 1984 Notice of Hearing to Consider Approval of Compromise and Settlement of Insurance Litigation should have put Chubb—a sophisticated

required for parties, like Chubb, whose claims were conjectural and unknown. This Court has held that these unambiguous terms of the 1986 Orders barred contribution claims against Travelers, including claims that were non-derivative of Manville's liability. *Bailey*, 129 S.Ct. at 2203–04 (App. 65a–67a). Chubb had every right to appear at the confirmation hearing and could have taken a direct appeal to preserve potential contribution claims against Manville's settled insurers. Chubb's error in understanding the terms of an order that this Court has found to be clear does not rise to a constitutional infirmity.[7]

Finally, Chubb concedes that bankruptcy proceedings are a "special remedial scheme" that can expressly foreclose successive litigation by non-litigants. Opp'n at 26–27; *see Taylor v. Sturgell*, 553 U.S. 880, 895 (2008); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Martin v. Wilks*, 490 U.S. 755, 765 (1989). However, Chubb argues—without citation or support—that because the Bankruptcy Court purportedly exceeded its *in rem* jurisdiction, it therefore went "beyond the scope of

insurer with asbestos-related insurance policies—on notice with regard to whatever asbestos-related claims it may have against Travelers and the other settling insurers." *In re Johns-Manville Corp.*, 340 B.R. at 68 (App. 163a–164a).

[7] Chubb again seeks refuge in a private letter written more than a year prior to the entry of the 1986 Orders that it claims limits the scope of the 1986 Orders. But this Court already rejected this proposition and held "where the plain terms of a court order unambiguously apply . . . they are entitled to their effect." *Bailey*, 129 S. Ct. at 2204 (App. 69a). Notice of the terms of such an unambiguous order are not rendered constitutionally suspect because the recipient claims two decades later it did not believe the order would be given its effect.

the justification of practical necessity undergirding this 'special remedial scheme.'" Opp'n at 27. This is patent nonsense.[8] An unbroken line of case law since *Mullane* holds that the constitutional adequacy of notice does not "vary depending on whether actions are *in rem* or *in personam*." *See e.g.*, *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796 n.3 (1983); *Shaffer v. Heitner*, 433 U.S. 186, 206 (1977).

B. The Court of Appeals' Violation of this Court's Mandate and Casting Aside of *Mullane* and Its Progeny Should Be Addressed by this Court

This Court should grant certiorari because the Court of Appeals' holding on remand reinstated its prior jurisdictional holding that this Court expressly rejected, and in so doing, rendered a decision which, if allowed to stand, would have seismic and systemic adverse impacts on the bankruptcy system. *Compare Bailey*, 129 S. Ct. at 2203 (App. 66a) ("[T]he 1986 Orders became final on direct review over two decades ago . . . whether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008 . . . ."), *with In re Johns-Manville Corp.*, 600 F.3d

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[8] Contrary to the Court of Appeals' ruling and Chubb's arguments, this Court has recognized that a bankruptcy court's jurisdiction is not limited to the res of a debtor's estate: "[t]he Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the res," including the power to "issue ancillary orders enforcing [bankruptcy courts'] *in rem* adjudications." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370 (2006) (quoting U.S. CONST. art. I, § 8, cl. 4).

at 149 (App. 30a) ("[W]e adhere to our holding . . . that the bankruptcy court exceeded its jurisdiction in 1986 . . . .").

Chubb also raises other issues which it concedes this case is not the vehicle to resolve and those issues are not relevant to this petition for certiorari. Opp'n at 33–34. The issue here is the Court of Appeals' disregard of the mandate of both this Court in *Bailey* and the sixty years of jurisprudence concerning the constitutional sufficiency of publication notice in the bankruptcy context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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